

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOHNSON & JOHNSON HEALTH CARE	.	
SYSTEMS INC.,	.	
	.	
Plaintiff,	.	Case No. 22-cv-02632
	.	
vs.	.	Newark, New Jersey
	.	March 17, 2023
SAVE ON SP, LLC,	.	
	.	
Defendant.	.	

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE CATHY L. WALDOR
UNITED STATES MAGISTRATE JUDGE

APPEARANCES (the parties appeared via Zoom videoconference):

For the Plaintiff: JEFFREY J. GREENBAUM, ESQ.
Sills Cummis & Gross P.C.
The Legal Center
One Riverfront Plaza
Newark, NJ 07102-5400
(973) 643-7000
jgreenbaum@sillscummis.com

HARRY SANDICK, ESQ.
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, NY 10036
(212) 336-2723
Hsandick@pbwt.com

Audio Operator:

Transcription Service: KING TRANSCRIPTION SERVICES
3 South Corporate Drive, Suite 203
Riverdale, NJ 07457
(973) 237-6080

Proceedings recorded by electronic sound recording; transcript
produced by transcription service.

1 (APPEARANCES continued)

2
3 For the Plaintiff: KATHERINE MARGUERITE LIEB, ESQ.
4 Sills Cummis & Gross P.C.
5 101 Park Avenue, 28th Floor
6 New York, NY 10178
7 (212) 643-7000
8 Klieb@sillscummis.com

9
10 For the Defendant: ERIC EVANS WOHLFORTH, JR., ESQ.
11 Gibbons, P.C.
12 One Gateway Center
13 Newark, NJ 07102-5310
14 (973) 596-4879
15 ewohlforth@gibbonslaw.com

16
17 ANDREW R. DUNLAP, ESQ.
18 Selendy Gay Elsberg PLLC
19 1290 Avenue of the Americas
20 New York, NY 10104
21 (212) 390-9005
22 Adunlap@selendygay.com

23
24 DAVID ELSBERG, ESQ.
25 Selendy Gay Elsberg PLLC
1290 Avenue of the Americas
New York, NY 10104
(212) 390-9004
Delsberg@selendygay.com

MEREDITH NELSON, ESQ.
Selendy Gay Elsberg PLLC
1290 Avenue of the Americas
New York, NY 10104
(212) 390-9069
Mnelson@selendygay.com

Also present: Anthony Callaghan
(Gibbons PC)

1 (Commencement of proceedings)

2

3 THE COURT: This is 22-2632, and it's 10:37 on
4 St. Patrick's Day, March 17th.

5 All right. So, folks, where did we leave off? I
6 understand you've resolved a good number of the issues. I'd
7 love to hear that you resolved them all.

8 It seems like from the bench memo that Tim Duva
9 [phonetic] gave me that you're not entirely on separate
10 pages, but -- yes. Mr. Nelson. You better turn your sound
11 on, if you want to be heard.

12 Uh-oh. IT. IT emergency.

13 So.

14 MALE SPEAKER: Your Honor?

15 MALE SPEAKER: I think we were about to go through
16 the issues that we had remaining. And Mr. Sandick was going
17 to take us through them.

18 THE COURT: Right.

19 But Mr. Nelson was raising his hand.

20 So I'm having a real dog event here.

21 (Off-the-record discussion)

22 THE COURT: Evans, Evans, why isn't Meredith
23 Nelson -- tell me, again.

24 He can't tell me.

25 (Interruption in proceedings)

1 MALE SPEAKER: Can you hear me now, Your Honor?

2 THE COURT: Yes. Sort of. But you have an echo.

3 MALE SPEAKER: Yeah. How about that? Is it a
4 little bit better?

5 THE COURT: No.

6 (Interruption in proceedings)

7 THE COURT: No, Ms. Nelson, Wohlforth.

8 MR. DUNLAP: I am going to surrender -- I wasn't
9 sure if we were going to take appearances, Your Honor. If
10 not, then I'll surrender my computer back to its owner,
11 Ms. Nelson.

12 THE COURT: Yeah, well, there's no echo. But
13 there's no volume.

14 (Interruption in proceedings)

15 MR. DUNLAP: Is that any better, Your Honor?

16 THE COURT: Yeah, that's substantially better.
17 We'll take it.

18 MR. DUNLAP: Okay. Thanks. I was unsure. And I
19 raised my hand to ask whether you were going to take
20 appearances. If not, then I'll --

21 THE COURT: Oh, yeah. I am.

22 MR. DUNLAP: Okay.

23 THE COURT: But -- no -- good idea.

24 Thank you, Evans.

25 Let's start with plaintiff. Let's have

1 appearances, please.

2 MR. SANDICK: Harry Sandick from Patterson Belknap
3 Webb & Tyler.

4 Good morning, Your Honor.

5 THE COURT: Good morning.

6 Mr. Greenbaum?

7 MR. GREENBAUM: Yes, Jeffrey J. Greenbaum, Sills
8 Cummis & Gross for the defendants. And with me is Katherine
9 Lieb from the same firm.

10 MS. LIEB: Good morning, Your Honor.

11 THE COURT: Good morning.

12 Defense.

13 MR. WOHLFORTH: I think Mr. Greenbaum may have
14 misspoken unless he's --

15 MR. SANDICK: Excuse me. Plaintiff --

16 (Simultaneous conversation)

17 MR. WOHLFORTH: Yeah, this is Evans Wohlforth from
18 the Gibbons firm. With me is Mr. Andrew Dunlap and Meredith
19 Nelson from Selendy Gay Elsberg on behalf of defendant SaveOn
20 SP LLC.

21 THE COURT: Where is Meredith Nelson? I don't see
22 her.

23 MR. WOHLFORTH: She's going to be jumping in here
24 as soon as I get off that what I had to say, which I just
25 have done.

1 THE COURT: Because I'm calling you Mr. Nelson
2 until she gets there.

3 So bear --

4 MS. NELSON: I am -- Your Honor.

5 THE COURT: Where is Evans Wohlforth? Okay.

6 All right.

7 So, folks, did we get all the appearances? I'm
8 sorry.

9 MR. CALLAGHAN: Your Honor, my name is Anthony
10 Callaghan. I'm also with the Gibbons firm. I'm a colleague
11 of Evans's. I've not entered an appearance, but I'm here to
12 observe.

13 THE COURT: Okay. So let's get personal now. Is
14 that an Irish accent?

15 MR. CALLAGHAN: Yes, Your Honor. And I was
16 delighted that you began the conference with the proper
17 salutation.

18 THE COURT: The proper salutation would be green
19 beer.

20 MR. CALLAGHAN: The top of the morning to you,
21 Your Honor.

22 THE COURT: Top of the morning to you, and you're
23 very welcome today. Very welcome here.

24 MALE SPEAKER: Mr. Callaghan, I apologize for my --
25 I didn't know what I was doing this morning. So --

1 THE COURT: Oh, my god.

2 MR. CALLAGHAN: Yes, the tie is definitely --

3 THE COURT: Okay.

4 Mr. Sandick, we were at you, I believe.

5 MR. SANDICK: Yes. I -- we were -- first, I want
6 to thank the Court for saving us again in making some more
7 time for the case.

8 As we said in the letter that we submitted
9 yesterday, we have in the past few days resolved the majority
10 of the points that JJHCS raised in our January 5th letters.
11 They've been resolved on terms that, you know, I think,
12 result in JJHCS getting substantially what we asked for, and
13 it's gratifying to have reached the resolution.

14 I will say it is somewhat frustrating to us that
15 it's taken us time to get here, and we do believe that the
16 Court's intervention, both the conferences and the knowledge
17 that Court would be taking it up has been helpful in bringing
18 about those resolutions.

19 Before I turn to the substantive issues that
20 remain -- there are a couple on our side of the ledger -- we
21 did want to not forget to ask if the Court can set another
22 conference in a few weeks so that any further disputes can be
23 brought to the Court. We're hopeful it won't be necessary,
24 but there are already other issues pending between the
25 parties. And I think just even the fact of the conference

1 has helped us bring about this result.

2 The other thing we wanted to bring to the Court's
3 attention is we're -- we have a number of third-party
4 subpoenas out, and we've heard from third-party counsel in
5 recent days that some of them want to wait until the end of
6 party discovery to produce documents. And they've made
7 comments to the effect of that the discovery deadlines in the
8 case, you know, won't hold, and we shouldn't feel ourselves,
9 you know, overly restrained by them. But we were concerned
10 to hear that. We certainly haven't suggested that to people.

11 And so we just wanted to also ask if the Court can
12 sort of confirm the scheduling order that Your Honor ordered
13 back last year remains in place and we should all try our
14 very hardest to meet those dates and that witnesses and
15 parties shouldn't use, you know, the -- the fear that the
16 schedule will not hold as an opportunity to, you know, kind
17 of bring about that end. So we just wanted to make that
18 point at the outset.

19 THE COURT: The schedule is on the docket and the
20 parties and third parties and any party should abide by the
21 schedule.

22 MR. SANDICK: Thank you very much, Your Honor.

23 So we only have three issues left. One of them is
24 from what I would call our "general issue" letter. The other
25 two are from our "specific issue" letters. These are the

1 January 5th letters.

2 The one issue that remains in the general issue
3 letter is that there's a difference of opinion between JJHCS
4 and SaveOn about whether the SaveOn production will relate to
5 documents that touch on drugs that are manufactured by other
6 makers.

7 We think that the evidence in this case at trial is
8 going to go beyond Janssen drugs for two reasons. First, our
9 GBL 349 claim, the consumer protection claim brought under
10 New York law -- SaveOn is a New York entity -- requires that
11 we prove broad impact on consumers. And so it is our
12 intention to prove that not only by the consumers who use the
13 drugs that are subject to the CarePath program that JJHCS
14 runs but a broader impact on consumers impacting -- that
15 impacted, including those that are taking drugs made by other
16 manufacturers.

17 Second, we think it's relevant for purposes of
18 understanding SaveOn's decisions with respect to our drugs.
19 If they make a certain decision about how to approach a
20 broader policy issue but they make it in the context of a
21 Merck drug or a Pfizer drug, more likely than not, they're
22 going to follow that same policy position when it comes to
23 Janssen drugs. And this is a -- the reason we put it in the
24 general issue letter is it touches on many requests. We are
25 seeking patient complaints from people who are concerned

1 about the impact on their treatment and finances of SaveOn,
2 whether or not those complaints relate to Janssen drugs.

3 To the extent that decisions are made about how to
4 approach designation of drugs under the Affordable Care Act,
5 and SaveOn is advising health plans about those issues, even
6 if it comes up in the context of a non-Janssen drug, those
7 policy issues are going to be relevant to this case.

8 And then finally there are a number of requests
9 that grow out of a promotion video in which the SaveOn
10 program is explained in detail. And we're seeking documents
11 about the terms that are used in those -- in that promotional
12 video, even if in the internal discussion at SaveOn, they are
13 not specifically talking about our drugs but may be
14 specifically talking about makers' drugs.

15 So in any event, those are the reasons why we think
16 we're entitled to evidence relating to non-Janssen drugs.

17 THE COURT: Well -- I'm a little stuck on the broad
18 effect on consumers. What's the law on that?

19 MR. SANDICK: Sure.

20 THE COURT: It's not a numerosity issue. The broad
21 effect would be, in your particular circumstance, that
22 consumers were materially misled and, in fact, misled to
23 violate a contract with JJ CS, is it? JJ CS?

24 MR. SANDICK: That's right.

25 THE COURT: So I don't -- why isn't that broad

1 enough?

2 MR. SANDICK: Sure. So we have our tortious
3 interference claim, which, as Your Honor has stated, really
4 relates to the relationship between JJHCS and its CarePath
5 patients. The GBL claim, the New York general business law,
6 § 349 claim, is somewhat different. And in the -- -- courts
7 have held that because JJHCS is not a consumer, to bring a
8 349 claim, we have to demonstrate harm to the public at
9 large.

10 THE COURT: Hold on one second. I have a minor
11 emergency.

12 MR. SANDICK: Sure.

13 (Interruption in proceedings)

14 (Recess)

15 THE COURT: I'm sorry, folks.

16 So continue, Mr. Sandick. I'm sorry.

17 MR. SANDICK: Sure. So the GBL claim and some of
18 this is tracked from Judge Vazquez's decision earlier this
19 year on the motion to dismiss, certainly -- SaveOn's acts are
20 directed at consumers, that they are materially deceptive or
21 misleading, that JJHCS has been injured as a result.

22 But because JJHCS is bringing this claim not as a
23 consumer itself but essentially based on harm to consumers,
24 we also have to demonstrate some harm to the public at large.

25 And so our concern is that if we are not --

1 THE COURT: Is that what "broad" means -- public at
2 large? I mean, that's really what my question is because I'm
3 unclear as to how consumers were broadly affected is defined.
4 Is it, as I said, by numbers? I don't -- I'm having a
5 problem seeing the relevance. So...

6 MR. SANDICK: The language I'm reading comes from a
7 Second Circuit decision called Boule v. Hutton.

8 THE COURT: Okay.

9 MR. SANDICK: And I am not sure that it quantifies
10 the harm to the public at large -- you know, that you have to
11 sort of affect a certain percentage of people or a number of
12 people.

13 But the -- but in order to make clear that we are
14 not only here concerned about the harm to the consumers who
15 are on CarePath but also consumers who might be in other
16 co-pay support programs. So, you know, we run a CarePath
17 program that helps people on certain drugs made by Janssen,
18 but there are other similar programs at virtually all the
19 manufacturers in the industry have.

20 And our point is that if there is evidence relating
21 to the decisions that are made by SaveOn relating to those
22 drugs or if there are consumer harm -- so if a patient says,
23 "I've been harmed by this. I'd been misled. But actually I
24 am not on CarePath. I'm on a Pfizer program or an AbbVie
25 program" -- you know, different drug manufacturers -- our

1 understanding is that under 349 we're allowed to prove our
2 case using that evidence. That we're not limited to evidence
3 relating to Janssen drugs -- on the 349 claim, on the --

4 THE COURT: Okay. I don't know that. But what I
5 do know -- or what I think I've ascertained -- who's going to
6 speak for plaintiff? -- is that plaintiff might be willing to
7 consider turning over some defined documents. Is that true?
8 Or more narrowly defined documents?

9 I can't hear you.

10 MR. DUNLAP: Your Honor, can you hear me now?

11 THE COURT: Yeah. Yeah. Good. Thanks. Go ahead.

12 MR. DUNLAP: And I apologize for all the IT issues
13 on our end. I hope it hasn't impacted the conference.

14 With the Court's permission, I -- we're going to be
15 splitting the argument between me and my associate,
16 Ms. Nelson.

17 THE COURT: Yup.

18 MR. DUNLAP: So I'm going to let her respond on
19 this issue.

20 THE COURT: Okay.

21 Go ahead, Ms. Nelson.

22 MS. NELSON: Yeah, thank you, Your Honor.

23 I think what you just said is correct. So we said
24 in our response to Johnson & Johnson's January letter that we
25 would be willing to meet and confer further regarding

1 narrower scope of documents that they might need.

2 But our problem is that they've moved on this issue
3 across the board. And it's one that permeates all of
4 discovery. We've had this same dispute over and over and
5 over again. So, for instance, recently we got a new set of
6 requests from them where they're asking for every single
7 communication that SaveOn had with any patient on any drug.

8 And that is going to vastly expand the scope of
9 discovery. Just to put it in context, there are 14 Janssen
10 drugs that are on SaveOn drug lists. There are 300 drugs in
11 total. Janssen is one of over a hundred different
12 manufacturers that SaveOn covers. So when we're talking
13 about these sort of issues that Mr. Sandick raised -- and I
14 think we disagree that they're relevant at all, and we can
15 talk about that, but our real concern here is that this is
16 increasing the scope of discovery by a huge factor for issues
17 that we think are frankly tangential at best.

18 So if Johnson & Johnson wants to approve a GBL
19 claim, it has to prove that something that harmed the public
20 at large also harmed it. These other drugs, other
21 manufacturers, other patients -- they don't harm Johnson &
22 Johnson. They're just not part of what Johnson & Johnson
23 actually has standing to bring.

24 And so, you know, it may be that there are narrower
25 categories of documents that we could agree to produce, but

1 this across-the-board motion that we should have to produce
2 for non-Janssen drugs in response to many, many requests,
3 we're just concerned that this is -- this is wildly opening
4 up discovery that is just not proportionate to the needs of
5 the case.

6 THE COURT: Okay.

7 Mr. Sandick.

8 MR. SANDICK: Well --

9 THE COURT: Mr. Dunlap, did you want to add
10 anything to that? I don't think you need to.

11 MR. DUNLAP: I think Ms. Nelson stated it very
12 well.

13 THE COURT: So do I.

14 Mr. Sandick.

15 MR. SANDICK: So two things that I wanted to point
16 out. One is just to give an example of the specific category
17 of documents that we think would be important here would be
18 patient complaints. If a patient says, "I felt I was
19 compelled to use SaveOn. You know, I feel as if I was
20 frightened by being turned down for my drugs in the pharmacy
21 unless I signed up with this program, and I didn't want to do
22 it, but I felt I had no choice," even if that patient is
23 taking a non-Janssen drug, the way in which the -- the GBL
24 claim embraces those claims, the Court said in its January
25 ruling on the motion to dismiss, the statute is intentionally

1 broad, applying to virtually all economic activity. And, you
2 know, threats to health and safety are meant to be embraced
3 by the 349 claim.

4 So, you know, we're certainly open to, you know,
5 having, you know, some of our cake and not all of our cake.
6 But the idea that we would only be getting information
7 relating to patients complaining who are taking Janssen drugs
8 I think would be a significant limitation, given how the
9 court has framed the elements of the 349 claim.

10 THE COURT: Okay.

11 MS. NELSON: -- may I respond very briefly?

12 THE COURT: You can, but you're ahead of the game.

13 MS. NELSON: Okay. You know what. Then I will
14 stop now --

15 (Simultaneous conversation)

16 MS. NELSON: -- agenda.

17 THE COURT: I completely disagree with Mr. Sandick.
18 And Ms. Nelson stated very succinctly what was on my mind as
19 well. I mean, we're opening the doors here -- there are 14
20 drugs. And I just think that what doesn't affect Johnson &
21 Johnson is not part of this lawsuit. So that's denied.

22 Now, if there are -- I always encourage parties to
23 meet and confer if there's something very specific and you
24 have smoke and you think you get fire from that, you can come
25 back on that, but right now, you are denied on that.

1 MR. SANDICK: Okay. Thank you, Your Honor.

2 The -- there are only two other issues remaining, I
3 believe, on our side of the ledger. One relates to Requests
4 For Production 43. And this is a request for documents
5 relating to SaveOn's communications about accumulator
6 programs. So an accumulator program is a term of art in this
7 industry. It's a type of program that says that if you get
8 co-pay support from an entity like CarePath, those
9 co-payments don't count towards your patient deductibles.
10 And there are state laws that prohibit accumulator programs.

11 And for purposes of showing wrongful conduct under
12 our tortious interference claim where we have to show whether
13 the conduct is wrongful, for purposes under our 349 claim
14 where we have to show a public harm, to the extent that
15 there's been communication at SaveOn about whether its
16 program complies with these state laws, we do think that that
17 is relevant.

18 We also think that, you know, taking the Court's
19 prior comments to heart, this is a much more discrete
20 request. This is not one that is likely to cause a burden,
21 in our view. It's a very specific type of request. If they
22 they've had internal discussions about whether their program
23 runs afoul of accumulator laws, we think it's relevant to
24 this case and should not prove a significant burden.

25 THE COURT: That goes to -- that goes to

1 willfulness, statutory violation -- or potential alleged
2 statutory violation? I am not sure I'm following.

3 MR. SANDICK: Sure. So I can -- just referring
4 back to the decision on the motion to dismiss, we have to
5 show that the action by SaveOn to interfere with the contract
6 is intentional, malicious, wrongful, unjustified. Those are
7 the kinds of words that courts have used.

8 THE COURT: So how does a violation of alleged
9 violation of a statute go to that? That's -- my connection's
10 not working here.

11 MR. SANDICK: Sure. The violation of a state law
12 would be wrongful means, and, therefore, it would be relevant
13 to our tortious interference claim. It would be relevant to
14 our 349 claim because, again, as we discussed a few moments
15 ago, it would be relevant to show -- and harm to the public
16 at large, if the program internally were one that SaveOn knew
17 ran up against the state prohibitions that exist in many
18 states on accumulator programs.

19 THE COURT: Ms. Nelson, are you going to take this
20 one?

21 MS. NELSON: I am.

22 THE COURT: Go ahead.

23 MS. NELSON: So I guess I want to say two things
24 and keep this brief.

25 First off, I think it's important for the Court to

1 understand what an accumulator program is, how it's different
2 from SaveOn, and why these state statutes exist.

3 So Mr. Sandick correctly said, under an accumulator
4 program, a plan will refuse to count co-assistance program --
5 payments that are made from a manufacturer towards a
6 patient's out-of-pocket maximum.

7 And so what will happen is that if a patient has a
8 somewhat high co-pay, they will go, they will fill their
9 drug, and at the beginning of the year, co-pay assistance
10 will cover it. And so they won't pay anything, or they'll
11 pay a very small amount.

12 And then somewhere in the middle of the year, the
13 patient will go to try to fill their drug; they've -- co-pay
14 assistance will have run out; they'll have used all that
15 money; and they won't have hit their out-of-pocket maximum
16 because the co-pay assistance haven't been counting towards
17 it. And so they're told, "Now you have to pay your co-pay."
18 And it may be very high. And that causes a huge problem for
19 consumers. That's why states have intervened to try to
20 protect against this issue.

21 And that's now what happens on SaveOn. So the way
22 that plans that are advised by SaveOn set up their benefits,
23 for the first part of the year, co-pay assistance covers a
24 big part of the co-pay, and the minute co-pay assistance is
25 extinguished, the plan kicks in. The plan covers everything.

1 So this harm that these statutes protect against
2 just doesn't happen on SaveOn's plans. So I just want to
3 make that very clear. It's not that there's nothing that
4 accumulators and SaveOn have in common. They do have some
5 things in common. But this big harm to the public just
6 doesn't happen on SaveOn plans.

7 So that's one piece of it.

8 The other piece of it is that Johnson & Johnson's
9 complaint talks about these statutes. It doesn't say
10 anything about SaveOn violating the statutes, and it doesn't
11 say anything about how these statutes connect to the elements
12 of its claim. So, for instance, on the GBL claim, they say
13 SaveOn harms the public by causing confusion. We either harm
14 the public by causing confusion, or we don't. But whether we
15 violate some other statute -- which we don't think we do --
16 but it's just completely tangential.

17 And I'd like to point out that Mr. Sandick
18 previewed at the beginning of this conference, we have come
19 back to Johnson & Johnson, and we've agreed to produce huge
20 numbers of documents. I think he even said, it satisfied
21 many of the requests that were previously pending before the
22 Court.

23 But at some point enough is enough. And this case
24 needs to be about the actual claims that Johnson & Johnson
25 brought. If there are these other statutes, there are other

1 parties that have the right to enforce them, but they're not
2 what Johnson & Johnson claims. And so we'd really just want
3 to say, at some point, the line needs to be drawn. And we
4 don't see how these are potentially relevant at all to the
5 claims that Johnson & Johnson actually brought.

6 THE COURT: Okay.

7 Mr. Sandick, anything else?

8 MR. SANDICK: Yeah, just one point. In
9 Ms. Nelson's explanation of the SaveOn program, one thing
10 that is significant that she omitted which does make SaveOn
11 in many respects similar or, in fact, an accumulator program
12 is that, while that an individual patient will not pay for
13 that particular drug, again, if the SaveOn program works as
14 it's been described, that patient will still have to meet
15 their annual deductible for their and their family's other
16 healthcare needs. So if they're on a second medication and
17 they got co-pay assistance, in the absence of SaveOn, that
18 patient would not have to pay anything further for their
19 annual deductible. It would have been satisfied because the
20 payor has already received payments in this case from
21 CarePath.

22 So in our view, SaveOn does share many of the
23 salient aspects of an accumulator program. And if they have
24 internal discussions about whether they, in fact, are
25 complying with those laws, it seems to us it goes directly to

1 wrongful means under our first claim and harm to the public
2 under our second claim.

3 But that's all I have to say.

4 THE COURT: Ms. Nelson, anything else?

5 MS. NELSON: Yes, I just want to say very
6 briefly -- this is a little bit of a side -- I don't want to
7 spend too much time on it.

8 But it is true that -- it is true that SaveOn, the
9 way that SaveOn plans operate, they don't let manufacturer
10 co-pay assistance program funds accumulate towards a
11 patient's out-of-pocket deductible. But that's just the same
12 as every other patient on the plan who's not on specialty
13 drugs. Right? If you have two patients on a plan -- one's
14 on specialty drugs; one's not -- if either of them have to
15 take their kid to the doctor for an ear infection, they both
16 will pay their co-pay the; right? That's just how this
17 works.

18 We don't really think that's a public harm treating
19 patients on specialty drugs just like every other patient on
20 their plan. And this similarity that has been pointed out is
21 just really beside the point.

22 The real issue with these statutes is that patients
23 suddenly are having to pay huge amounts for their specialty
24 drugs. And that's what doesn't happen on SaveOn.

25 So I just wanted to be very clear about that.

1 THE COURT: Okay. I -- Mr. Sandick, again, I'm
2 going to rule against you. I don't see the relevance at all.
3 And it's too much.

4 MR. SANDICK: Okay. Thank you, Your Honor.

5 THE COURT: Mr. Dunlap, are you going to do the
6 order?

7 MR. DUNLAP: We will.

8 I think Mr. Sandick might have one more issue, and
9 then we have a few --

10 THE COURT: He does. But I'm just preparing you to
11 that you make sure you take good notes.

12 MR. SANDICK: The final issue relates to
13 Request 52. This is in section E of our specific issues
14 letter.

15 SaveOn's a private company. We have no visibility
16 into the finances of the company. Has it profited from
17 CarePath and other co-pay support programs? What has it done
18 within? Is a damages award collectible? These kinds of
19 things are all, you know -- not known to us because of that.

20 And so we're seeking some very basic financial
21 statement disclosure.

22 That's all I have to say.

23 THE COURT: That's good.

24 Denied without prejudice.

25 MR. SANDICK: Okay.

1 THE COURT: Oh, Ms. Nelson. I'm sorry.

2 Did you want to say anything?

3 MS. NELSON: You know, it was actually Mr. Dunlap
4 who was going to handle that.

5 THE COURT: No. I don't want to hear from him.
6 He's doing the order.

7 MS. NELSON: Yeah, we'll be fine. Thank you.

8 THE COURT: All right. Now, we get to -- I guess
9 your requests are still open?

10 MR. DUNLAP: Your Honor, we have three items we're
11 moving on.

12 THE COURT: Go ahead.

13 MR. DUNLAP: And given how the day is going, I'm
14 tempted to let Ms. Nelson handle this one too. But I'm going
15 to -- I'm going to barrel ahead.

16 The first issue is actually sort of a group of
17 issues, and we began to talk about this at the end of the
18 last conference, which is we're seeking information regarding
19 the historical development, administration, to marketing and
20 financing of Johnson & Johnson's co-pay assistance programs,
21 including CarePath. And also historical information,
22 financial information regarding the Janssen drugs that those
23 co-pay assistance programs are designed to cover. So I'd
24 just like to talk about why this is relevant and then why the
25 arguments we've heard from Johnson & Johnson resisting

1 production, we don't think wash here.

2 So in terms of relevance, as you know, Johnson &
3 Johnson sells specialty drugs, and for members of private
4 health plans, most of those costs are paid by the plan, but
5 then the member's responsible for the co-pay or co-insurance.

6 Johnson & Johnson set up co-pay assistance to pay
7 some of those members' co-pays for them. And the plans
8 advised by SaveOn reacted by raising co-pay amounts. And
9 under the terms of the plan, that means Johnson & Johnson is
10 paying more in the co-pay assistance up to the budget it has
11 set on its own. The plan is paying a little bit less, but
12 the patient, as Ms. Nelson said, is paying nothing.

13 So we want to understand the finances and the
14 origins of CarePath and/or related Janssen drugs. So why is
15 that relevant? First, Johnson & Johnson says the co-pay
16 assistance programs, including CarePath, are designed to
17 benefit patients. That's right at the beginning of their
18 complaint. But we don't believe that's true. We believe
19 they are designed to benefit Johnson & Johnson. Essentially,
20 Johnson & Johnson is paying patients to take its drugs.
21 That's what these programs are.

22 And you don't just have to take it from me. The
23 Department of Health and Human Services in the federal payor
24 context, has called this a kickback under the antikickback
25 statute. And the Second Circuit has agreed.

1 And by making -- by paying this co-pay or large
2 portion of it for the patient, you make the patient
3 price-insensitive, which means Johnson & Johnson can then go
4 increase the cost of the drugs that it is selling, not
5 because it's suddenly more expensive to produce the drugs,
6 not because they're more effective, but just so it can boost
7 its own profits. And, of course, those costs are borne by
8 the plans.

9 We don't think that this is for members' benefits,
10 as they said.

11 Second, Johnson & Johnson says, well, by advising
12 plans to change their benefits in this way, SaveOn is
13 threatening the financial viability of co-pay assistance
14 programs like CarePath. And they say that's one of the key
15 public harms that they allege in their complaint, if you look
16 at paragraph 114 of their complaint.

17 But we just don't think that's true. We think as a
18 result of what SaveOn and its clients do, more people sign up
19 for CarePath, more people buy Janssen drugs, more people fill
20 their Janssen drugs more often.

21 And you have to remember for each dollar that
22 Johnson & Johnson spends in co-pay assistance, it makes a
23 huge return on investment in terms of selling more drugs.
24 Some of these drugs can cost a quarter of a million dollars a
25 year to fill. And so if Johnson & Johnson can spend a few

1 thousand dollars to induce a new patient to buy that drug, it
2 has done very, very well.

3 And we believe that they are making more money from
4 selling Janssen drugs as a result of what SaveOn is doing.
5 And so the SaveOn program, as they call it, can't be a threat
6 to CarePath's financial viability. And, in fact, we have
7 alleged an affirmative defense where we don't think they're
8 injured at all by the conduct they've described.

9 Third, they say that what SaveOn is doing increases
10 healthcare costs, which, again, they say is a public harm.
11 We disagree. We think it's actually what they're doing that
12 increases co-pay costs, making patients price-insensitive so
13 they can jack up the price of their drugs. In fact, we think
14 it would be irresponsible for these health plans that SaveOn
15 advises, who, let us not forget, are fiduciaries and have a
16 duty under the law to maximize plan assets to try and take
17 advantage of these funds that Johnson & Johnson is making
18 voluntarily available.

19 Fourth -- and there are only five of these points.
20 Fourth, they're seeking a permanent injunction here. They
21 want to shut down these operations which would basically shut
22 down SaveOn's business. But we intend to show under the
23 permanent injunction standard that they have not suffered any
24 real injury and that this injunction would not serve the
25 public interests. And we have an affirmative defense on that

1 point.

2 And then finally -- and this is absolutely
3 critical -- Johnson & Johnson alleges that its damages --
4 right? -- the way stated on his cause of damages by causing
5 it to pay out more in co-pay assistance under these new plan
6 terms than it did under the old plan terms.

7 But what they don't say is that by doing this, it
8 actually causes Janssen to sell more drugs and to get more
9 money in from the drug sales. For every new patient that
10 SaveOn steers toward CarePath and taking Janssen drugs that
11 Johnson & Johnson would not have signed up on its own, they
12 pay a little bit more in co-pay assistance for that patient,
13 but they make a lot more in terms of selling the drugs.

14 And so we don't think that if you average all this
15 out, Johnson & Johnson has suffered any financial harm, or if
16 they have, it's certainly a lot less than what they are
17 alleging. We need the data that we're talking about in order
18 to test this. This is critical to defeating Johnson &
19 Johnson's damages allegations. And we actually have an
20 affirmative defense on this as well.

21 Now, the objections we've heard from Johnson &
22 Johnson, you -- they take various flavors, but they all boil
23 down to asserting burden; at least we think the main ones do.
24 They say, oh, they've already agreed to produce a large
25 number of documents, including about their injuries. But

1 they've given us a hard "no" on the type of documents that
2 we're talking about here. They're glad to give us documents
3 about how much CarePath has spent. But they're not
4 interested in giving us documents about how much more money
5 Janssen has made as a result of what we're doing. They don't
6 want to give us documents about how they set the CarePath
7 budgets going back historically, the return on investment or
8 the link between the drug prices and the CarePath program.

9 They say, "Well, you're asking for a huge number of
10 documents -- you know, every document across this huge
11 company."

12 We're not. We're looking for relevant documents on
13 these topics. And we think this is a bit of a red herring.
14 It's for any request in any case -- at least any case I've
15 ever done, if you order that these documents are relevant and
16 compel them to produce, the parties will meet and confer.
17 We'll talk about relevant custodians. We'll talk about
18 relevant document sources. We'll try to agree. And if we
19 can't agree on the protocol, we'll come back, and you can
20 resolve that.

21 And then finally, they say, "Well, goodness,
22 SaveOn's only been in business since 2017, but we want
23 documents going back to 2009," and doesn't that increase
24 their burden as well?

25 But we're asking to go back to that time because

1 that's when we understand the co-pay assistance programs
2 started. They may not have been called CarePath at that
3 point, but that is when we understand the programs started.

4 And you want to understand the purpose of a
5 program, it helps to go back to when it began so you can see
6 what was going on. And then we want to see over those years
7 what were the budgets set at; what was the actual return on
8 investment; what were the corresponding drug prices that they
9 set.

10 And then we want to compare that information from
11 when the program started until 2017 with what happened after
12 SaveOn came on the scene. And then we will have a basis to
13 say, well, what have the actual impact of SaveOn and the
14 plans that it advises been on CarePath and on sales of
15 Janssen drugs. We need to be able to do that comparison, and
16 for that, we need the historical data.

17 And, again, if they're worried about that going
18 back too far will cause a burden, that's why we can meet and
19 confer about custodians and document sources and all the rest
20 of that.

21 So, again, we view these documents as absolutely
22 critical to our defense. And we're asking you to rule today
23 that they're relevant and that Johnson & Johnson should
24 produce them.

25 MR. SANDICK: Your Honor, we have three principal

1 categories of objection to this request -- to these requests:
2 Relevance, burden, and the fact that we have already agreed
3 to provide what they, in fact, need to make out these
4 defenses. They say documents -- as, Mr. Dunlap, I suppose,
5 has acknowledged -- going back to 2009, eight years before
6 the time frame of the allegations in the complaint. SaveOn
7 did not exist until 2017. CarePath in its current form did
8 not exist until 2016. And all of this is in service of
9 things that are irrelevant and not tethered to the complaint
10 in any way.

11 What they want to do is make this into a case about
12 the nature of drug pricing, either at Janssen or more broadly
13 in the American economy, but it has nothing to do with this
14 case.

15 The question in this case is not is CarePath good?
16 The question is does SaveOn harm the public when it deceives
17 customers? Does SaveOn tortiously interfere with a contract
18 between CarePath and its patients? They say that if
19 Johnson & Johnson makes money on developing and selling
20 therapies, that essentially they are privileged to interfere
21 with our contract or to mislead consumers. And it just
22 simply is not a defense -- not in this court or any other
23 court --

24 THE COURT: How do they show no injury?

25 MR. SANDICK: Well, they can show no injury is

1 that -- well, first of all, I am not sure that they can show
2 it. But the documents that we have already agreed to provide
3 are all documents relating to at the harm caused by SaveOn.
4 All of the data that forms the basis for the allegations in
5 our complaint, co-pay assistance budget, actual and
6 projected, for all patients involved in CarePath. They're
7 getting enrollment information, how much was offered and paid
8 to each patient, what drugs they took for 2016 to 2022. Not
9 back to 2009. They are also getting documents from Janssen
10 which specifically address the issue of cost. They're
11 getting documents to show how JJHCS determines the level of
12 support.

13 The fact is that, as they'll see when they review
14 the documents, that the key -- the key metric in looking at
15 price and not the so-called list price, but the -- what is
16 the net price, what do health plans actually pay. And
17 Johnson & Johnson pays, as we will disclose to them in
18 discovery, pays literally billions of dollars in discounts
19 and rebates to payors, to health plans so that the net prices
20 that patients actually pay or that health plans actually pay
21 are far, far less than the list prices that SaveOn quotes in
22 its papers and cites in its answer.

23 The breadth of their request, again, is striking:
24 From 2009 to the present, for each year, all documents and
25 communications regarding the basis for Janssen's decision to

1 set price of its drugs, including all documents relating to
2 labor costs, manufacturing costs.

3 Johnson & Johnson throughout the company has
4 140,000 employees, 200 affiliates, many of which are involved
5 in the manufacture of drugs, the creation of drugs, the
6 decisions about how to price drugs. And, according to
7 SaveOn, all of that is necessary, and yet they haven't tied
8 it to anything in the complaint. It does not create a basis
9 to breach a contract or to induce someone to breach a
10 contract. They seek data, they've asked -- they have one
11 request, Request 28 where they want data by every single
12 patient who has taken any Janssen drug going back to 2009,
13 every single fill. So they come to court and try to act as
14 if these requests are reasonable modest requests. But, in
15 fact, these are requests that go in terms of time frame and
16 the scope of what they're seeking and the reach throughout
17 the company, the requests are punitive in and of themselves.
18 And they have not made a case for why these drugs are
19 necessary to have a defense against the specific claims here.
20 They are interested in talking about the price of drugs being
21 too high, but that is neither here nor there. That does not
22 give them a basis to interfere with contracts or to violate
23 the New York general business law.

24 THE COURT: My focus really is in defending injury.
25 That's my focus.

1 So what I think, Mr. Dunlap and Ms. Nelson, this is
2 a premature request. I am not going to rule on it. I'll
3 hear further argument once Mr. Sandick produces what he said
4 he's going to produce and we can get a little more specific.

5 I will tell you that I think it's an awfully broad
6 not just temporally but otherwise broad request. I
7 understand the background and the basis for the request, but
8 as I said, not -- it's premature. Let's see what Mr. Sandick
9 produces. And let's see if you can modify and streamline
10 your arguments to me and your requests after that.

11 MR. DUNLAP: Your Honor, may I make -- we
12 understand your ruling. I would just like to --

13 THE COURT: Go ahead. Sure.

14 MR. DUNLAP: -- point on the record, which is I
15 don't believe this is a situation where, well, if they
16 produce enough of something, maybe we don't need something
17 else. They've drawn a categorical line here that they are
18 not going to give us historical information about the
19 budgets, the return on investment. They're not going to give
20 us anything about why they set up the drug prices that these
21 programs cover, the way that they do.

22 So we're glad to look at whatever Johnson & Johnson
23 produces. We just think we're going to be back here and
24 however long it takes --

25 (Simultaneous conversation)

1 MR. DUNLAP: -- arguments to you.

2 And what he said he'll produce is stuff relating to
3 their allegations and their allegations of harm. But we --
4 what we want are things relevant to the benefits and how it
5 shows that they weren't actually harmed and that they don't
6 have any actual damages.

7 We are glad to wait, if that's what you say.

8 But I just want to be very clear now.

9 THE COURT: -- here.

10 MR. DUNLAP: Because I know you're concerned about
11 moving the case.

12 THE COURT: I am. And I understand your arguments
13 as well. And that's what I asked Mr. Sandick is aren't you
14 entitled to prove that there's no injury -- because that's
15 really what I think this boils down to. But I, number one,
16 think temporally it's way out of line. You can meet and
17 confer and see if there's anything else in the interim, but I
18 will allow you to renew that request after Mr. Sandick
19 produces everything he says he's going to produce.

20 And I'm just hoping, Mr. Dunlap, from that, that
21 maybe it can be a more targeted request.

22 MR. DUNLAP: Understood, Your Honor.

23 May I make one request that may help with what you
24 just said, which is if you could ask Mr. Sandick to
25 prioritize production of documents relating to what they call

1 | their allegations of harm and all the rest of it so that we
2 | can make a determination earlier and come back to you with
3 | specifics based on the record earlier about this, that might
4 | help moved the issue along.

5 | THE COURT: That would help me as well. So -- to
6 | move the case, Mr. Sandick.

7 | So if you could prioritize that and hopefully we
8 | can refine those additional requests through your initial
9 | production or your completed production of that information.

10 | And I understand that it may not be dispositive --
11 | that may not be dispositive of the issue at hand. And I
12 | think I understand the issue at hand. So I am not
13 | foreclosing it, but I'd like to take this a little more
14 | slowly than Mr. Dunlap would.

15 | MR. SANDICK: We will do as Your Honor has
16 | requested, of course.

17 | THE COURT: Okay. Thank you.

18 | MR. DUNLAP: Your Honor, we have two other issues.
19 | And with the spirit of the day, I'm going to let Ms. Nelson
20 | take it.

21 | THE COURT: Why is that the spirit of the day?

22 | MR. DUNLAP: I was just saying that she's -- so far
23 | she's done very well and I've done okay.

24 | So I'm hoping -- I'm hoping that, you know, that
25 | streak continues.

1 THE COURT: Okay.

2 Go ahead, Ms. Nelson.

3 MS. NELSON: Sorry. I wanted to make sure we were
4 muted so we didn't have any more audio issues.

5 So I think the next two issues can be very quick.

6 We asked Johnson & Johnson to produce all documents
7 concerning the drafting and the meaning of the CarePath terms
8 and conditions. Those are obviously critical documents for
9 this case. They've accused us of tortiously interfering, of
10 inducing patients to breach their contracts. And so if there
11 is no breach, there is no tortious interference. That is a
12 complete defense.

13 And we need this sort of robust set of documents
14 about the meaning of the terms and conditions so that we can
15 make arguments about what those terms actually mean and why
16 patients didn't breach them when they signed up for CarePath.

17 So -- and this is actually something that Judge
18 Vazquez said in his motion to dismiss, said specifically,
19 that the interpretation of the contract would be resolved
20 after discovery.

21 So we just think these are core documents. And in
22 a case involving a breach of contract, parties produce
23 documents that go to the meaning of the contract. That's how
24 you get extrinsic evidence. That's how you make, you know,
25 these types of arguments about ambiguous contract terms.

1 So Johnson & Johnson made an offer to produce some
2 documents. But there are still a number of documents that
3 they're holding back. So they're holding back documents from
4 before 2017. And, again, we have the same issue where they
5 say our request goes back too far, and they shouldn't have to
6 produce documents from before the year when SaveOn came into
7 existence.

8 I think the problem with this argument is that
9 SaveOn may have come into existence in 2017, but these
10 CarePath terms and conditions certainly predated SaveOn. And
11 we don't know exactly when they were drafted. Right?
12 Mr. Sandick said CarePath in its current form came into
13 existence in 2016. I don't know what "in its current form"
14 means. They haven't provided us with any more information.
15 They haven't told us -- you know, these terms and conditions
16 were actually drafted in 2016. We don't know.

17 But I think it's very reasonable for us to say we
18 need documents that go back to when you actually drafted the
19 terms and conditions themselves. So this time limitation is
20 sort of an artificial one. And it's severely prejudicing
21 SaveOn because we don't have the documents that go back.

22 And I think this leads to one other point which is
23 that this is a contract of adhesion; right? Johnson &
24 Johnson drafted these terms. They put them out in the world.
25 It's not a breach of contract case where both sides

1 negotiated and we have some access to documents and they have
2 some. They have all the documents. So if we don't get this
3 extrinsic evidence from them, we're just not getting it. And
4 we won't be able to make sort of a robust set of arguments
5 about what these terms actually mean.

6 Another set of category that they seem to be
7 holding back would be -- of performance. So they've offered
8 to give us some documents about the drafting. But what also
9 matters is how Johnson & Johnson actually treated these terms
10 and conditions over years. So SaveOn existed for many years,
11 and Johnson & Johnson never said anything to the effect of
12 "We think you're breaching our terms and conditions."

13 We think how they interpreted their own contract
14 over that period of time and even before SaveOn is completely
15 relevant to the interpretation of these terms and that we
16 need those documents.

17 And the last thing I would say is, you know, they
18 offered to produce documents about one of the terms in the
19 contract. But when parties make arguments about the meaning
20 of contract terms, they usually refer to the contract as a
21 whole. There are sort of important structural arguments that
22 you can make. Sometimes if a term has been deleted or
23 changed, you can use that to draw inferences about the
24 meanings of other terms.

25 We can't figure out what those terms unless we have

1 the full history.

2 And so on this one, I certainly Your Honor's
3 concern about the time frame with respect to the other
4 requests, and we'll deal with this. But this is a much
5 more -- request, and, frankly, it's at the heart of the case.

6 And so we would ask Your Honor to grant our motion
7 to compel, that they should produce documents at least back
8 to when these terms and conditions were first drafted. And
9 they should give us information about when they were drafted
10 so that we can work together and actually form, you know, a
11 search protocol that will get us the documents we need.

12 MR. SANDICK: Your Honor.

13 THE COURT: Yes.

14 MR. SANDICK: I want to make it very clear to the
15 Court that we have agreed already to make a substantial
16 production of documents on this issue.

17 First of all, with respect to drafting history, we
18 have agreed to go back to 2017. The terms and conditions
19 change all the time, as the SaveOn answer points out, for two
20 of the drugs, Stelara and Tremfya, they changed just within
21 the past 18 months. So they're going to get documents
22 relating to all drafting history going back to 2017 to when
23 SaveOn began its program. And we're doing that voluntarily.
24 That's not -- that's something we agreed to prior to coming
25 here this morning, Your Honor.

1 Secondly --

2 THE COURT: But let me just interrupt you because
3 you did make a point -- and I picked up on it as well, maybe
4 you could explain, you said in its iteration now.

5 MR. SANDICK: Sure.

6 THE COURT: What was the precedent?

7 MR. SANDICK: Sure. Johnson & Johnson, through
8 other means, has had some forms of co-pay support in the
9 past. The CarePath program that we're talking about in this
10 case was established in 2016 --

11 THE COURT: Right.

12 MR. SANDICK: -- by patient assistance across a
13 broad number of specialty drugs and other drugs as well.
14 CarePath also is a -- it's essentially a brand name.
15 CarePath does lots of things beyond co-pay support. So, for
16 instance, CarePath has a nurse navigator program so that
17 patients who are on Janssen drugs can call in and get advice
18 from medical personnel to answer their questions: Can I take
19 this drug with that drug? Or if I take this drug and miss a
20 dose, what do I do? So CarePath does lots of other things.

21 And it's a -- it's kind of name within the
22 Johnson & Johnson company that does this -- that does this
23 work.

24 So in 2016, CarePath came together in its current
25 form to be the -- the mechanism or the name for the mechanism

1 of providing CarePath support for a set of specialty drugs.

2 That's what we meant --

3 (Simultaneous conversation)

4 MR. SANDICK: -- CarePath may have been used prior
5 to 2016 at Johnson & Johnson to mean other things.

6 But what we are focused on here is the CarePath
7 program that's existed during the time when SaveOn has
8 existed. And that's --

9 (Simultaneous conversation)

10 THE COURT: So -- anything that preceded the
11 current use of the name CarePath, has nothing to do with
12 CarePath or with the formulation of any contracts or terms of
13 contracts? I mean, I'm --

14 MR. SANDICK: That's -- I mean, yes; that's our
15 view.

16 But, number two --

17 THE COURT: I want to know if that's the fact.

18 MR. SANDICK: That -- yes. The CarePath terms and
19 conditions that we're talking about that are relevant in this
20 case for the time period we're talking about were ones that
21 came into being after that.

22 There may have been other terms and conditions with
23 other programs in the history of co-pay assistance at
24 Johnson & Johnson, but that is a sweeping expansion of the
25 case from beyond the program and the harms of the program

1 that is the issue of the complaint to essentially like a term
2 paper about the history of all co-pay support ever at
3 Johnson & Johnson.

4 And that would dramatically expand the scope of
5 discovery into time periods and places that are not
6 relevant --

7 THE COURT: I don't know that that's what they're
8 looking for. I think they're looking to interpret, maybe
9 from an historical standpoint, the terms.

10 MS. NELSON: Your Honor --

11 THE COURT: Do I have this wrong? I mean...

12 MS. NELSON: No. You have it completely right.

13 So if CarePath --

14 THE COURT: You think you tell me I'm right, you
15 think I'm going to rule in your favor.

16 MS. NELSON: No. No. No. This is true.

17 I mean, I think the point about a term paper is
18 really missing the point.

19 If CarePath came into existence in 2016 and when it
20 came into existence, someone at Johnson & Johnson said, "Hey,
21 we have these terms and conditions from our old program.
22 Let's use those again."

23 THE COURT: Right. That's what I'm trying to get
24 at. That's what I'm trying to get at.

25 But Mr. Dunlap seemed to say -- or represent that

1 they're not related.

2 I'm really trying to get a fine point on that.

3 MR. SANDICK: Yeah, I mean, what -- what I would
4 propose is that we make the production that we've already
5 committed to make. If it doesn't answer all of their
6 questions, they can always come back and ask for additional
7 documents.

8 But to, as an initial matter, go so far in time
9 behind to look at programs that are not the Johnson & Johnson
10 program that's at issue in this case, seems like an
11 unwarranted expansion of discovery --

12 (Simultaneous conversation)

13 THE COURT: But what if -- what if the requests
14 were narrowed -- hmmm, then you would have to determine
15 relevance. I mean, anything related or relevant to the
16 formation of the current CarePath. In order -- I do believe
17 in order to interpret terms, there has to be a background.
18 It can't -- there's got to be some historical, as I said -- I
19 don't know what you can provide or what -- I'm willing to
20 limit this, but I do think that in order to see the evolution
21 of terms and the reason therefor, it's necessary to give some
22 amount of background. I am not going to back to, you know,
23 CarePath 1 in 1920, but...

24 MR. SANDICK: Well, Your Honor, and that -- and we
25 agree that there is a reason to go back, and we are offering

1 and have already promised to go back to 2017 to the present
2 for these terms. And if doesn't answer all of their
3 questions, they can always come back for more.

4 We are also offering to give documents discussing
5 the meaning of the only term in this contract that is under
6 dispute at all, which is the "other offer" language, that at
7 the end, the final term states that this program offer may
8 not be used -- the program offer being CarePath -- may not be
9 used with any other coupon, discount, prescription savings
10 card, free trial or other offer.

11 And that's the -- that's the key --
12 (Simultaneous conversation)

13 THE COURT: Right. I get that. I get that --
14 (Simultaneous conversation)

15 MR. SANDICK: In the sense that there are other
16 documents on this issue, we are willing to produce documents
17 about how people within our client interpreted that language.

18 The other -- to give a meaning for, you know, sort
19 of -- I've forgotten the framing that Ms. Nelson used, but
20 sort of force of performance understanding for all of these
21 terms would result in nothing more than meaningless burden.
22 So, for instance, one term says the program is only for
23 people age 6 or older. Why is that relevant here? Another
24 one says the program is only for people using private health
25 insurance. As Mr. Dunlap's already explained, people on

1 Medicare and Medicaid aren't permitted by the terms of their
2 program, their health program, Medicare and Medicaid, to
3 participate.

4 So to go back and produce all of the documents on
5 all of these issues, it's just -- it's just an unwarranted
6 burden for no relevant documents where we've already agreed
7 to make a substantial production. This one I -- you know, on
8 the last issue, I think Mr. Dunlap is right that there are
9 some real differences of principle.

10 Here, we've actually agreed to make a significant
11 production on this issue, and yet we're still trying to
12 prevent it from being CarePath in 1920.

13 THE COURT: Okay. Okay.

14 So I'm going to hold off, as Mr. Sandick said,
15 Mr. Dunlap and Ms. Nelson, and let's see what he produces.
16 And, again, very often, after initial productions, there are
17 more tailored requests, and perhaps that will happen and ease
18 the burden of all of us as well.

19 But I think Mr. Sandick's correct that let him do
20 this production. If, in fact, there's again, smoke leading
21 to fire or something that -- I am not even talking about
22 burden right now, honestly. I'm really targeting on
23 relevance and trying to again streamline the issues in the
24 case.

25 So that will be denied without prejudice subject to

1 renewal after production, the same as the last request.

2 MS. NELSON: I understand, Your Honor. And I
3 appreciate it.

4 THE COURT: I really need to know, you know, to
5 understand more specifically -- let's see what he produces.
6 And that will help me as well.

7 MS. NELSON: Two things I'd just like to state very
8 briefly.

9 THE COURT: Sure.

10 MS. NELSON: One, we would ask that Mr. Sandick
11 prioritize his production as well for the same reasons as
12 before.

13 And, second, part of the reason that we haven't
14 been able to tailor our request is because Johnson & Johnson
15 won't tell us any information about the terms and conditions
16 before 2017, sometimes 2016. So --

17 THE COURT: Yeah.

18 MS. NELSON: -- I just want to be very clear, we
19 sort of hit a roadblock that's inhibited our ability to try
20 to narrow this and really get what we want. But we are not
21 looking for every document about completely irrelevant terms
22 and conditions. That's really not the goal here.

23 So we will look at what he produces, and we will
24 hopefully come back --

25 (Simultaneous conversation)

1 THE COURT: Well, I think that -- I think that you
2 all need to talk to each other after the production because I
3 am not sure you're speaking the same language. I understand
4 that you're entitled to -- and I agree -- to know the
5 evolution of the terms not limited to what Mr. Sandick says,
6 necessarily -- or that little portion -- because that doesn't
7 always tell the whole story.

8 So let's see what he produces, and let's -- and you
9 all talk after that. And if you specifically say, "Look, I
10 need this because I need to understand how this happened,"
11 maybe Mr. Sandick will agree?

12 MR. SANDICK: We're happy to listen and maybe to
13 agree. Who knows? I don't want to foreclose that
14 possibility, and I think the Court's emphasis on meet and
15 confer is -- you know, is one we recognize and want to honor.

16 THE COURT: Okay. There's another, Ms. Nelson;
17 right? Or.

18 MS. NELSON: One last issue.

19 THE COURT: Go ahead.

20 MS. NELSON: And this is a fairly narrow one.

21 So the parties agree that in 2017 or in 2018,
22 Johnson & Johnson actually negotiated or considered using
23 SaveOn as fee services for its own health plan. And
24 Mr. Sandick and Johnson & Johnson in their last letter, they
25 admitted that this happened.

1 Now, Johnson & Johnson says we rejected it out of
2 hand. It was presented to us, and we said, "No way."

3 We have a different understanding of what actually
4 happened, that there were, in fact, some negotiations and
5 back-and-forth and that it is actually a different part of
6 Johnson & Johnson that came and sort of shut them down.

7 But if Johnson & Johnson itself as an employer, a
8 sponsor of an employer health plan, considered using SaveOn
9 services and gave some thought to -- us -- would this benefit
10 our employees? You know, is this bad for the public? --
11 that is both extremely important evidence going to their
12 claims of public harm. It also goes directly to their
13 credibility. And this isn't a fishing expedition. This
14 isn't a -- we made this up and we think maybe this happened.

15 Everyone agreed that this happened. And it's clear
16 from what Johnson & Johnson put in response to our letter
17 that they know this happened. They know when it happened.
18 They know who was involved. They have all the information
19 that one would need to do search.

20 And we see this as a very narrow but extremely
21 pertinent category of documents. And we're talking about
22 2017 to 2018. This isn't even, you know, in the realm of
23 sort of --

24 THE COURT: But they rejected you.

25 MS. NELSON: Yes. But why they rejected us. If

1 they rejected us not because they thought we were -- you
2 know, what we do is bad for patients but because somebody
3 from marketing came in and said, "Oh, no, no, this is a bad
4 look" -- right? The reasons and why, frankly, if they looked
5 at our documents and they said, "Wow, this is a terrible
6 program for patients, we can't possibly sign up for this," I
7 don't see why Mr. Sandick would be opposed to producing that
8 right?

9 But what we think may have happened is they looked
10 at our documents and said there are some benefits to this
11 program.

12 And if those exist, we would like to see them.

13 THE COURT: So in other words, your argument to a
14 finder of fact would be even plaintiff saw that we had some
15 benefits. So why are they suing us? Hmmm.

16 MS. NELSON: I mean, I think it would be even
17 plaintiffs saw that we had some benefits. Maybe plaintiffs
18 saw that this is something that is helpful to patients.

19 And that undermines their allegations now that what
20 we do out in the world harms patient. I think it also just
21 goes directly to the credibility of their witnesses.

22 THE COURT: I think you're stretching it. I really
23 think that's a stretch. I don't even know what -- would
24 produce, but if they considered your program and rejected
25 you, I know you're saying, oh, well, it's incredible that

1 they're suing us when they even considered us.

2 That --

3 (Simultaneous conversation)

4 MS. NELSON: I realize I'm in a hole, Your Honor.

5 So I am not going to try to dig myself deeper --

6 THE COURT: Can -- I allow everybody to try.

7 MS. NELSON: I mean, one thing I would like to say.

8 From our perspective, what we understand is that the reason
9 that they've rejected us is not because they decided this was
10 a bad program but because they actually -- somebody else
11 actually came in and said, for optics reasons, you can't do
12 this.

13 So we don't know. We don't know. Maybe they don't
14 have any internal documents that say, actually, SaveOn really
15 does do a great thing for patients, making sure that they
16 always pay nothing for their drugs. Right?

17 But if those documents exist, they do go to
18 credibility. They absolutely do. And they think this is a
19 very narrow band, which is why --

20 THE COURT: I think it's a narrow band too, but
21 you're denied.

22 Mr. Sandick, did you want to make a record on that?

23 MR. SANDICK: No, Your Honor. Thank you.

24 THE COURT: Yeah, I think that's a little far
25 afield for me. I understand your points -- they rejected

1 you. So who cares why? It's not going to -- and I wholly
2 doubt from an evidentiary standpoint that that would ever get
3 in.

4 MS. NELSON: Thank Your Honor. We appreciate --
5 (Simultaneous conversation)

6 THE COURT: Not that I'm making any evidentiary
7 rulings, but -- all right.

8 So, Mr. Dunlap, you're doing the order; right?

9 MR. DUNLAP: We will prepare the order. Yes.

10 THE COURT: Thank you.

11 And run it by Mr. Sandick and team.

12 MR. DUNLAP: Absolutely.

13 THE COURT: And don't disagree on the letter
14 because I don't like doing that.

15 MR. SANDICK: Judge, did you want to give us
16 another day as a holding pattern.

17 THE COURT: Yeah, yeah. So what do you want? Two
18 or three weeks? Let me see. I'll look at my calendar while
19 you're here.

20 MR. SANDICK: I know that first week of April is
21 the -- is the week that all the holidays fall on. And so
22 maybe the second week is better for the lawyers and the
23 parties.

24 THE COURT: Okay.

25 MR. SANDICK: I think some schools may be out that

1 week, although my kids' school have a funny March break
2 inside.

3 THE COURT: So week of the 10th, we're talking
4 about. Oh, my god.

5 MR. SANDICK: Yes, Your Honor.

6 MR. GREENBAUM: I'm out of the country that week,
7 but Ms. Lieb can cover my absence.

8 THE COURT: All right. Let me -- I -- that may not
9 be -- you could -- I have April 13th but it would be in the
10 afternoon. You can do in person or Zoom? Up to you.

11 MR. SANDICK: We're happy to come in person,
12 Your Honor, and I believe I will be here on the 13th,
13 although I didn't confer with Mr. Greenbaum, and I don't want
14 to deprive him of the chance to participate.

15 MR. GREENBAUM: That's -- what? -- a Friday of a
16 Thursday?

17 THE COURT: That's a Thursday.

18 MR. GREENBAUM: I'm actually flying back that day.

19 THE COURT: So let me --

20 MR. GREENBAUM: So we -- like the following Monday?

21 THE COURT: Hold on, Jeff. Let me look.

22 Hold on. But -- okay. Hold on.

23 So I have the afternoon the 18th or 19th, meaning,
24 you know, like, 2 o'clock.

25 MR. GREENBAUM: I could do the 18th, not the 19th.

1 THE COURT: Okay. Check, everybody.

2 MR. DUNLAP: Your Honor, I'm actually going to be
3 in transit on the 18th, myself. It appears I'm leaving just
4 as Mr. Greenbaum is coming.

5 THE COURT: Oh, so you are going to be going or
6 coming back on the 18th.

7 MR. DUNLAP: I will be leaving on the 18th.

8 THE COURT: So you're out of pocket that week?

9 MR. GREENBAUM: Is it the whole day? Would you
10 have the morning or not?

11 THE COURT: Oh, please don't even say that.

12 MR. DUNLAP: The 17th, if that was still on the
13 table would work. The 13th's not ideal, but I could make it
14 work.

15 THE COURT: What's not ideal?

16 MR. DUNLAP: The 13th isn't ideal. Mr. Sandick
17 referred to school breaks. Apparently his kids and my kids
18 are on duelling schedules, but I could make that week work,
19 if that's best for the Court. But the --

20 (Simultaneous conversation)

21 THE COURT: Jeff, will you -- Jeff, you are out of
22 town, then, though; right?

23 MR. GREENBAUM: I am. But if -- I mean, if that's
24 the only time that works, Mr. Sandick can do it in my
25 absence. But if we could do the 17th, that would be great.

1 In the afternoon, if that's possible.

2 THE COURT: Okay. My next -- I hate to keep
3 pushing this out, but the 24th is pretty good for me.

4 MR. DUNLAP: 24th, I believe works here. Just --

5 MR. SANDICK: I am not available on the 24th. I
6 mean, I can get another Patterson lawyer to cover, but
7 unfortunately I have another commitment that day that I
8 cannot move.

9 MR. DUNLAP: Your Honor, we're also -- I know
10 Mr. Sandick talked about the first week of April being hard,
11 but we're glad to do it sooner.

12 THE COURT: Yeah, I'm trying to do it sooner.

13 MR. SANDICK: Sure. We can take an earlier time.

14 MR. GREENBAUM: The 13th, if the 13th works then
15 I'll, you know --

16 THE COURT: They want to come in in person, Tim.
17 Hold on.

18

19 THE COURT: What did you say works?

20 MR. SANDICK: Like the 3rd or the 4th. Is that
21 what you were saying, Andrew?

22 MR. DUNLAP: Yeah, I could make the 3rd or the 4th.

23 THE COURT: Okay. Is everybody on --

24 MR. DUNLAP: Let me just check with the team here.

25 MR. SANDICK: I could do the 3rd or the morning of

1 the 4th.

2 MS. LIEB: Jeff, I think you're gone that week as
3 well.

4 MR. GREENBAUM: That's true. But --

5 MS. LIEB: I -- my kids are off that week, so I
6 can't do in person that week to cover Jeff. But I could do
7 the 13th. Or I could Zoom in as well.

8 THE COURT: Well, it looks like we're going to be
9 Zooming.

10 So, I mean, I want you to come in because we have
11 such fun.

12 MR. GREENBAUM: How about the end of March, the
13 last week of March?

14 THE COURT: That's not even two weeks, is it? It's
15 two weeks. I mean, I'm -- I'm on criminal duty that week,
16 the 27th, so I could bring you in, and if you were
17 interrupted by crime, you'd have to be interrupted.

18 MR. DUNLAP: Is this the last week of March you're
19 referring to, Your Honor?

20 THE COURT: Yeah. If that is going to be too soon,
21 though, let's not do something that's stupid.

22 MR. DUNLAP: I just -- it seems to me that's little
23 soon. I mean, we've got a lot to meet and confer about.
24 There's some outstanding stuff we can try and make letters
25 about, but --

1 THE COURT: Okay.

2 MR. DUNLAP: I mean, that strikes me a little soon.
3 Anytime in April, I think, if -- if we can get calendars to
4 line up, I think would be fine.

5 MR. GREENBAUM: Judge, with all due respect, I have
6 to drop off now. So I'll leave the dates to Mr. Sandick and
7 Ms. Lieb.

8 THE COURT: Okay. Have a good --

9 MR. GREENBAUM: Thank you for your time.

10 THE COURT: Thank you. Hold on. Yeah, my deputy's
11 texting me. It sounds like the only way we're going to get
12 this done is Zoom-wise.

13 Mrs. Lieb, if you're -- if you can do that week in
14 April.

15 MS. LIEB: Yeah, I should --

16 THE COURT: We'll -- at some point.

17 MS. LIEB: Or you can do in person on the 13th as
18 well, if that's on the table. If we prefer in person, I can
19 do it the week of April 10th.

20 THE COURT: Yeah, somebody -- somebody -- Jeff
21 can't be there on the 13th, he said. But --

22 MS. LIEB: Jeff is gone in Israel for two weeks.
23 So the first two weeks of April Jeff is going to be out of
24 pocket.

25 So I'm happy to -- I can -- I can be there the

1 first week of April, but I need to do virtually. And the
2 second week of April, I can be there in person.

3 THE COURT: All right, folks. So choose your --
4 choose your person.

5 MR. SANDICK: All fine for us. As much as I
6 benefit from Jeff's counsel, I worry that if we push it too
7 far into the month, we'll lose some momentum and also to be
8 candid, my own schedule becomes complicated. I have a
9 witness who's scheduled to testify in a federal trial in
10 Florida, and I need to be with him later in the month for a
11 couple of days on the road.

12 THE COURT: Okay.

13 MR. DUNLAP: You mean for the 13th, Your Honor? It
14 sounds like.

15 THE COURT: Yeah, we can aim for the 13th.

16 We can do the 13th in person --

17 MR. DUNLAP: In Zoom or in person, as you prefer.

18 THE COURT: Well, if it's in person, I mean, excuse
19 me -- are we off the record, Tim? Please take us off the
20 record because I might curse a lot.

21 (Conclusion of proceedings)

22

23

24

25

Certification

I, SARA L. KERN, Transcriptionist, do hereby certify that the 59 pages contained herein constitute a full, true, and accurate transcript from the official electronic recording of the proceedings had in the above-entitled matter; that research was performed on the spelling of proper names and utilizing the information provided, but that in many cases the spellings were educated guesses; that the transcript was prepared by me or under my direction and was done to the best of my skill and ability.

I further certify that I am in no way related to any of the parties hereto nor am I in any way interested in the outcome hereof.

s/ *Sara L. Kern*

20th of March, 2023

Signature of Approved Transcriber

Date

Sara L. Kern, CET**D-338
King Transcription Services
3 South Corporate Drive, Suite 203
Riverdale, NJ 07457
(973) 237-6080